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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DAISY R.,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES AGENCY,

Real Parties in Interest.

G037130

(Super. Ct. No. DP012118)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Gary Vincent, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Petition denied.

Deborah A. Kwast, Public Defender, Frank Ospino, Assistant Public Defender, Paul T. DeQuattro and Dennis M. Nolan, Deputy Public Defenders for Petitioner.

Benjamin P. de Mayo, County Counsel, Dana J. Stits, Senior Deputy County Counsel, and Aurelio Torre, Deputy County Counsel for Real Party in Interest.

Law Office of Harold LaFlamme and Yana Kennedy for the Minor.

* * *

Petitioner Daisy R. (mother) seeks writ review (Welf. & Inst. Code, § 366.26, subd. (*l*); Cal. Rules of Court, rule 38.1)[1] of orders issued at the six-month review hearing, where the court terminated family reunification services and set a .26 hearing as to one-year-old Brandy R. Mother contends the evidence does not support the court's findings regarding her lack of substantive progress in her service plan and the improbability of Brandy's safe return within the statutory period. She further contends the court substituted its own subjective standards as justifying its orders, rather than following the legislative mandate established by the relevant statutes. We deny the petition.

FACTS

In January 2004, mother, then 18 years old, was evaluated in a dependency proceeding as suffering mental retardation, with "poor ability to size up a problem,

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified. The permanency hearing under section 366.26 is designated the .26 hearing. Further rule references are to the California Rules of Court.

analyze and synthesize," "poor conceptual thinking and difficulty selecting and verbalizing appropriate relationships between two objects or concepts," and "limited intellectual ability prevent[ing] her from adequately parenting her son." The son, Brandy's older half-sibling, Nathan, had been removed from mother's care in October 2003, at six months of age, when he sustained a fractured ulna. Mother was unable to explain how the injury occurred, and she failed to seek medical treatment for the infant for more than seven hours, despite Nathan's screams of pain when the arm was moved and the explicit instructions of two public health nurses who, coincidentally, had made a routine visit to the home that morning to find the child in an infant seat, unattended, on a patio table.

Despite Orange County Social Services Agency's (SSA) supportive services during Nathan's dependency, mother never achieved an understanding of the necessary parenting skills to supervise and protect the child. Her therapist opined mother needed "constant supervision when with Nathan," noted mother was "capable of learning, at least in a rote manner," but questioned "whether she could exercise good judgment, make appropriate decisions, and deal with more than one thing at a time." Mother's intellectual limitations[2] rendered her unable "to anticipate problems, to analyze situations, to generalize, or to critically evaluate situations." Some 15 months into Nathan's dependency, SSA's social worker observed that "[d]espite parent education, therapy, and collateral services there has been absolutely no evidence of change in mother's parenting of Nathan."

When Brandy's proceedings were initiated in August 2005, Nathan had been in foster care for nearly two years, and mother appeared resigned to the likelihood,

[2] Mother's IQ scores ranged from 61 on one test to 83 on another, the latter placing her in the 13th percentile of the relevant population.

if not the inevitability, of his adoption.[3] The initial petition filed on Brandy's behalf stated a single count under section 300, subdivision (j) (sibling abuse or neglect), but an amended petition added a count under section 300, subdivision (b) (failure to protect), alleging: mother's inability to anticipate situations that would put a child at risk, her long-term participation in hands-on parent education counseling, her inability to develop the requisite parenting skills without assistance, and a recent incident in court when mother and the maternal grandmother, despite having been instructed in child safety issues, allowed Nathan to play with tiny chess pieces that were a choking hazard and then failed to intervene when he put one of the pieces in his mouth. This event was reminiscent of two prior child-endangering episodes in which mother failed to appreciate the importance of removing a bleach bottle from a location accessible to Nathan and lacked the insight to interrupt the congested child's bottle feeding when he began to choke.

It is not necessary to summarize in detail mother's activities relating to Brandy's dependency over the course of the next nine months. SSA concedes mother essentially complied with the components of her service plan, regularly visited the child unless her work schedule interfered, and received praise and some positive assessments from her social worker and service providers. Indeed, mother's social worker testified he had no concerns at all about mother's parenting skills, a statement the court found "unbelievably uninformed." On the other hand, the court accorded great credence to the testimony of the visitation monitor who had spent six months observing mother's hands-on interaction or lack thereof with Brandy. The monitor testified mother showed *no* improvement in the way she acted towards the baby. For example, when Brandy was sleeping, mother would wake her by vigorously and repeatedly kissing her on the lips, or

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[3] Indeed, mother ceased interacting with Nathan at visits, preferring to concentrate her efforts on Brandy, and she told the social worker it was no longer necessary to have Nathan attend the visits. Mother's reunification services with Nathan were subsequently terminated.

when mother was unable to stop the infant's crying, she would unsafely "plop[] Brandy on the sofa" and turn her back on her, even though Brandy was at an age that she could roll over, or she would put the child on the floor with age-inappropriate toys and then sit down and start reading a magazine or looking out the window while the baby continued to cry. The monitor stated that some days mother was better than others, but on balance there was "always something" requiring direction or intervention. Mother did not play with Brandy during visits, but would ordinarily just hold her, jostle her, and kiss her. Mother reacted to the monitor's prompting by "making a smirk with her face, or lips, or rolling her eyes."

Brandy's emergency shelter home (ESH) mother, who also served as visitation monitor for a few months early in the dependency, observed mother did not make eye contact with Brandy, but treated her "like sort of an object, like a doll, dressing her up, or bouncing her, like jittering her cheek to cheek, not really looking at her." The ESH mother had to redirect mother from unsafe interaction with Brandy when mother put the then three-month-old infant "standing on the floor, and held her hands, and stood behind her, and sort of booted her legs and said, 'Look, my baby's walking. My baby's walking.'" Mother had to be told twice that the activity could hurt Brandy's arms or legs and mother was supposed to pick the child up. Additionally, despite the ESH mother's suggestions that she put Brandy's face at some distance from her own, look the child in the eyes, talk to her and smile at her, mother showed no interest in engaging with the baby. In general, in the ESH mother's opinion, mother appeared to be unaware of Brandy as a person — her physical needs,[4] moods, and limitations, and mother would routinely repeat questionable behaviors from which she had been redirected only a few minutes earlier. The ESH mother opined mother knew how to bounce and jiggle the

[4] When Brandy was placed in her foster home, mother came to see her after three days, ready to resume nursing the child, and appeared quite surprised or puzzled to learn the baby had been bottle-fed in the interim.

baby, but not how to comfort or nurture her or attend to her needs. She noted mother had to be prompted to perform fundamental tasks such as feeding and changing the baby, although this situation improved later, according to the subsequent monitor, who stated mother "usually" took care of those tasks without direction.

When mother testified, the court was solicitous in accommodating her special needs, reminding counsel that questions had to be framed in language "simple enough for understanding." Nonetheless, mother seemed unable to comprehend or respond to several questions. She did, however, testify to her desire to be with Brandy and her sadness at parting after visits, and she denied the negative incidents to which the monitors had testified. She said that on appointments with her therapist, she had been told she should call the foster parents to ask how Brandy was doing, and she had been given suggestions about parenting, for instance: "[The therapist] tells me to put the baby on the sofa, try to get her hands and kind of clap her hands and try to, you know, play like patty cake, or something like that." She described her therapy sessions: "I play with the baby, and [the therapist] just watch[es] us play, and that's all we do. She just watch[es] us play. [¶] . . . [¶] . . . [A]nd whenever she sees something that is not right, she just tells me, you know, 'Don't do it like that, do it like this.'" When asked what she would need to do to take care of Brandy if the child were to live with her 24 hours a day, seven days a week, mother responded, "[P]robably . . . take her to the park, take her to eat, or maybe take her to my friend's house, I don't know, like with my family, you know."

Our summary is not intended to suggest there was no evidence favorable to mother. Under our standard of review, our primary focus is on evidence supporting the juvenile court's determination. (*Dawnel D. v. Superior Court* (1999) 74 Cal.App.4th 393, 398.) However, we note the record establishes mother regularly participated in the requisite classes, and her therapist and parenting coach both found her motivated and developing a degree of "growth and improvement" in parenting skills, including playing and interacting with Brandy. She was further observed to be maturing in her appreciation

that she needed to prioritize the child's health and safety needs. But mother's abilities were demonstrated only in a supervised, instructional setting, and her own testimony underscored her inability independently to recall or identify any of the skills or techniques she had learned for responsible parenting of her child.

At the conclusion of the hearing, the court made a lengthy statement of the reasons it had decided not to afford mother further reunification services. Remarking, "This is one of a handful of very difficult decisions that I've had to make over the last 16 years," the court noted the central theme of the case was mother's lack of capacity, illustrated by her long-established and unchanged "poor ability to anticipate problems and analyze solutions." Alluding to Nathan's case extending back to 2003, the court observed the same issue "was alive and raised" then, thus mother had "had a long and extensive period of time to deal with" the problem, and should have achieved a degree of clarity or insight in all that time, but had not. The court found the social worker entirely without credibility in his uncritical appraisal of mother's potential for adequate parenting. And while respecting everyone's compassionate desire "to give the benefit of all possible doubt [to mother]," the court cautioned, "There comes a time when reality has to be faced."

Continuing its analysis, the court stated, "You can be well meaning, and be talented, and be able to do certain things, but not able to care for a child that cannot care for itself. In this case, there's been no showing after two and a half years of therapy [extending from Nathan's dependency], and all the therapy in this particular case, that mother has any ability to anticipate problems and analyze the solutions necessary to protect a small child. I wish it were otherwise, but we've been at it for two and a half years. . . . Another six months is not — the progress, if any, is painfully slow." Although mother had been "fortified with people surrounding her with counseling, with therapy, with services," nothing had made any difference. The court found there remained *unchallenged* evidence of "a substantial risk of detriment clearly physically to [Brandy],"

and further services would not change the fundamental problem or produce a different result. On that basis, the court terminated reunification services and set a .26 hearing, noting mother would continue to have visitation in the four-month interval before the .26 hearing, and thus the potential remained, however remote, for establishing a record on which to base a section 388 petition for modification.

DISCUSSION

"The statutes governing reunification services and review hearings must be considered in light of the juvenile dependency system as a whole. [Citation.] The overall objective of that system is the protection of abused or neglected children and the provision of permanent, stable homes if they cannot be returned to parental custody within a reasonable time. [Citation.] The general purpose of dependency law is to safeguard the welfare and best interests of children." (*In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1241.)

With this overriding purpose in mind, we turn to section 361.5, subd. (a)(2), with its mandate that when a child under the age of three years is removed from parental physical custody, court-ordered services shall *not* exceed six months "unless the court finds there is a substantial probability the child can be returned to the parents' custody within an extended twelve- or eighteen-month period." (*Daria D. v. Superior Court* (1998) 61 Cal.App.4th 606, 610 (*Daria D.*); § 361.5. subd. (a)(2).) The *Daria D.* court, tracing the legislative history of the six-month provision, explains the statute was intended "to give juvenile courts greater flexibility in meeting the needs of young children, 'in cases with a poor prognosis for family reunification, (e.g., chronic substance abuse, multiple previous removals, abandonment, and chronic history of mental illness).' [Citation.] . . . '[V]ery young children . . . require a more timely resolution of a permanent plan because of their vulnerable stage of development. . . . [G]iven the unique

developmental needs of infants and toddlers, moving to permanency more quickly is critical.'" (*Daria D., supra,* 61 Cal.App.4th at pp. 611-612; see also, *In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038 ["The Legislature has expressed increasing concern with the perceived and accurate reality that time is of the essence in offering permanent planning for dependent children"].)

In light of such urgency, the Legislature has given the court discretion, at the initial six-month review, to schedule a .26 hearing if it finds by clear and convincing evidence that "the parent failed to participate regularly *and* make substantive progress in a court-ordered treatment plan." (§ 366.21, subd. (e), italics added.) Section 366.21's companion rule, rule 1460(f)(1)(E), echoes the statute, including its provision allowing the court to set the .26 hearing "unless the court finds a substantial probability that the child may be returned within 6 months or within 12 months of the date the child entered foster care, whichever is sooner, or that reasonable services have not been offered or provided." The rule goes into further detail, instructing that the court must base its substantial-probability-of-return finding on *all* of the following findings: "(i) The parent or guardian has consistently and regularly contacted and visited the child; [¶] (ii) The parent or guardian has made significant progress in resolving the problems that led to the removal of the child; and [¶] (iii) The parent or guardian has demonstrated the capacity and ability to complete the objectives of the treatment plan and to provide for the child's safety, protection, physical and emotional health, and special needs." (Rule 1460(f)(1)(E).)

These established legal principles present an insurmountable obstacle to mother's effort to undo the juvenile court's decision to terminate reunification services and schedule the .26 permanency hearing. The court's implied finding by clear and convincing evidence that mother failed to make substantive progress in a court-ordered treatment plan is unimpeachable. Mother points to her efforts to fulfill every requirement of her service plan, but that is only one aspect of the inquiry. As stated by the court in *In*

re Dustin R. (1997) 54 Cal.App.4th 1131, 1143, "[S]imply complying with the reunification plan by attending the required therapy sessions and visiting the children is to be considered by the court; but it is not determinative. The court must also consider the parents' progress and their capacity to meet the objectives of the plan; otherwise the reasons for removing the children out-of-home will not have been ameliorated." A parent fails to show substantive progress and/or capacity to meet the objectives of the plan where he or she basically remains in the dark about the child's fundamental needs and what must be done to meet them. (See, e.g., *id.* at pp. 1141-1142.) Where consistent plan participation does not yield improved parenting skills or appreciation of the fundamental parental role, the initial reasons for out-of-home placement continue relatively unabated. That is the case here, and the court's findings are supported by substantial evidence.

Mother's further contention that the court impermissibly substituted a nonstatutory standard for prematurely terminating reunification services does not withstand scrutiny. Bear in mind the court had before it Nathan's history, its own extension of an additional service period in that case based on SSA's unreasonable handling of visitation (and notwithstanding mother's failure to make progress), and its ordering of six months of reunification services in Brandy's case over the objections of both SSA and the child's attorney and despite mother's fruitless efforts to remedy the problems precipitating the removal of her children. As SSA aptly notes, the record demonstrates the court gave mother the benefit of every doubt when it terminated services that had for so long proved ineffectual. There is clearly a legitimate statutory basis, i.e., no substantive progress (§ 366.21, subd. (e)), underlying the orders terminating reunification services at the six month review and setting the .26 hearing.

Mother argues the court failed to use the right words, i.e., it did not make an express finding of no substantive progress. We cannot presume error on that basis alone. "[W]e must indulge every presumption and intendment in support of the

correctness of the [orders]," and on that foundation, we are allowed to imply the preliminary findings from the overall record. (*In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 569-570.) Here, the court stated, inter alia: The central theme of the case was mother's lack of capacity; mother's "poor ability to anticipate problems and analyze solutions" was long-established and unchanged; mother had not achieved clarity or insight into the problems leading to dependency, notwithstanding her "long and extensive period of time to deal with" those problems; there had been "no showing that . . . mother ha[d] any ability to anticipate problems and analyze the solutions necessary to protect a small child" and any progress had been "painfully slow"; and notwithstanding counseling, therapy, and a plethora of services, nothing had made any difference. Without question, the record provides the proper basis for an implied finding of no substantive progress.

DISPOSITION

The petition is denied.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.